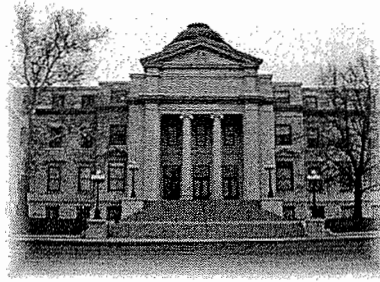


STATE OF IOWA



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Date: October 17, 2007
To: Freedom of Information Study Committee
From: William P. Angrick II

I would like to offer some comments and a proposal as a follow-up to my presentation at the September 6, 2007 Committee meeting.

First, I summarize the legislative issues and recommendations by my office which I do not believe were addressed by Professor Bonfield in his September 6 presentation (p. 2).

Second, I present a sampling of the 155 Public Records and Open meetings complaints my office has handled so far in 2007 (p. 4).

Third, I describe a proposal that would offer a dedicated team within the Ombudsman's office which would do the following (p. 7):

- investigate and resolve complaints,
- publish investigative reports,
- contract for mediations,
- refer violations to the Attorney General for prosecution,
- respond to information inquiries,
- conduct trainings and outreach,
- publish a semiannual report regarding public records, open meetings, and privacy matters, and
- develop a FOI web page.

I have attached a proposed budget to carry out this enhanced public records, open meetings, and privacy component within the Ombudsman's office.

Ombudsman's Issues not Included in Professor Bonfield's Presentation

Many issues I raised in my written presentation at the September meeting of the FOI Study Committee were included in Professor Bonfield's presentation. What follows is a summary of those sections which would be overlooked, if only Professor Bonfield's remarks are considered. I have referenced the sections and page numbers from my presentation. It is my hope that the Committee will consider these issues also.

Section 4 – Page 4

Retention of Closed Session Minutes and Tapes

Iowa Code section 21.5(4) states that the minutes and tapes of a closed session shall be preserved for "at least one year from the date of that meeting." Another provision, Iowa Code section 372.13(5), specifically requires city councils to keep records of their proceedings for at least five years. I believe "proceedings" encompass closed sessions of city council meetings and this more specific provision is controlling. However, some city attorneys are relying on section 21.5(4) to advise city councils that they may destroy the minutes or tapes after one year. I recommend clarifying the retention periods for minutes and tapes of closed meetings, in consideration of the public interests in facilitating historical reviews and in providing for accountability.

Section 5 – Page 5

Retention of Open Meeting Tapes

The public records law and open meetings law are silent regarding the retention of audio records of open meetings. Many governmental bodies record meetings, but then destroy the tapes after using them to prepare the written minutes. For the same reasons mentioned in Section 4, I recommend clarifying the retention requirements for minutes and recordings of open meetings for all governmental bodies.

Section 7 – Page 6

Administrative Remedy for Errors and Enforcement

In situations when a governmental body determines that it had closed a meeting in error, I recommend the creation of an administrative remedy that would enable the governmental body to vote to disclose the recording or information from the closed meeting, without the need to have a court action filed under section 21.5(4). In addition, a member who votes for such disclosure should not be held liable under 21.6(3)(a) for having initially closed the meeting improperly.

Section 8 – Page 7

Sealed or Confidential

Iowa Code section 21.5 provides that closed session minutes and tapes are "sealed" and not available for public inspection. Some governmental bodies have disputed the right of my office or even members of a body who were not present at the meeting to review the closed

session records. They interpret the language, in particular the term “sealed,” as mandating court action in all situations. I recommend clarifying any ambiguity and disagreement by deleting the word “sealed” but retaining the right of governmental bodies to keep the records “confidential,” subject to appropriate access by persons or entities with the right or responsibility to review them.

Section 9 – Page 7

Law Enforcement Investigative Reports

Iowa Code section 22.7(5) states that investigative reports may be considered confidential. What is an investigative report? Many law enforcement agencies label their reports by different names and may not consistently identify them as investigative reports. Furthermore, what information constitutes “immediate facts and circumstances surrounding a crime or incident” that may be disclosed? Does the public get access to the actual report (with redactions) or to pieces of information gleaned from the reports? I recommend that these issues be clarified in the law.

Section 11 – Page 8

Fair Information Practices Act Does Not Apply to Local Government

Many local agencies have not considered what records they possess or how they intend to respond to requests for public records. Iowa Code section 22.11 requires state agencies to have information policies (through the adoption of rules). I recommend that a similar requirement be made applicable to political subdivisions. Written policies have value because they are publicly debated and provide guidance and proper oversight.

In addition, with increasing concerns about protecting personal information, I recommend defining what is meant by “personally identifiable information.”

I also recommend expanding this section to include provisions pertaining to the proper retention of records, especially those which are sensitive or confidential.

Section 12 - Subsection B – Page 8

Unique Identifiers and Breach of Security

During the 2007 legislative session, I submitted a bill (HSB 193, SSB 1223) regarding redaction of Social Security numbers. It also defined what is “personal information” and provided for investigation and notice when there has been a breach of security involving personal information. As public records are becoming more easily available with electronic access and dissemination, these are issues that should be addressed. I believe this is important, as there are many examples of government and private entities which have not been good stewards of information.

How the Citizens' Aide/Ombudsman Responds to Complaints about Open Records and Open Meetings

The Ombudsman's office currently does not have enforcement powers over violations of the Open Records Act or the Open Meetings Act. However, we use our statutory powers of investigation, persuasion and reporting to resolve a vast majority of the complaints the office does substantiate.

My office may investigate complaints alleging agency actions that are contrary to law, unreasonable, unfair, oppressive, inconsistent with practice, based on a mistake in law or fact, based on improper motivation, or unaccompanied by a statement of reasons. If our investigation substantiates a complaint, I can make recommendations to the agency to take corrective or remedial actions, or take steps to avert future problems. If persuasion fails or the concerns otherwise call for public criticism, I have the authority to publish a report.

As of October 2007, the Ombudsman has:

- Received **155** open records or open meetings complaints; **111** of those complaints are closed.
- Substantiated **27**. The substantiated cases resulted in the opening of records or meetings, apologies, or other corrective or remedial action by the agency.
- Responded to **68** information requests from citizens and public officials about the Open Records Act or Open Meetings Act.
- Published **2** critical reports, one about a mayor and the second regarding a city council.

The following is a sampling of the Ombudsman's work in 2007:

- A citizen who asked a county assessor for a list of farm properties was told that his request would cost \$1,650, since the county had a policy charging a 20-cent-per-parcel fee for that information. When the citizen cited a document from the Ombudsman clarifying that agencies may only bill the actual costs of fulfilling a records request, the assessor stopped returning her messages. The Ombudsman then called the assessor, who admitted she had ignored the request because of the citizen's tone. "Quite honestly, if you wouldn't have called, I would have never responded," the assessor told the Ombudsman. The information was later provided to the citizen at no charge. (0703142)
- A sign posted in a city council chamber prohibiting citizens from audio-taping council meetings was removed after the Ombudsman pointed out to the mayor that the prohibition was illegal. (0702551)
- A library board held a public work session in a building that became locked during the meeting. The board agreed to re-vote the one approved agenda item at a subsequent

public meeting. The board's president also agreed to stop holding work sessions in a locked building unless staff was on hand to allow people inside. (0702276)

- Citizens of a small town were surprised to receive bills that reflected a higher rate for sewer service, since the city had never published notice that the rate hike was approved by the city council. When the Ombudsman questioned the timing of the rate hikes, the city agreed to issue credits to customers until the council's decision was published. The city clerk also discovered that the council had improperly waived a third reading of the ordinance authorizing the rate hike and promised to hold that hearing before imposing the new rate. (0703499)
- A handicapped woman who was unable to climb a flight of stairs to attend a scheduled meeting a few hours prior to the meeting asked the city administrator to hold the meeting elsewhere but was told her request had to be in writing. When the Ombudsman learned that the city was subject of earlier complaints of this sort, he put the woman in touch with federal authorities, who, along with the Ombudsman, continue to monitor the city's compliance with the Americans with Disabilities Act. (0700238)
- Moments after a city mayor informed a library board of its obligation to follow the Open Meetings law, the board's president called for a vote on a controversial pay-raise matter that was not posted to the board's agenda in advance of the meeting. The Ombudsman questioned the mayor and city attorney about the board's tactics, and the mayor said the board would re-vote the matter at its next meeting. (0702972)
- A firefighter who discovered a gathering of township leaders discussing the appointment of a new fire chief was asked to leave, even though all three trustees of the township board were present. The Ombudsman contacted a trustee, who said the board was planning to apologize for holding what they now understood was an illegal meeting. The board ultimately apologized to firefighters and put the chief's appointment to a vote of the fire department, as required by its by-laws. (0700829)
- A 28E organization routinely delayed publication of its quarterly meeting minutes for months, leaving citizens without knowledge of what had occurred at those meetings. When the Ombudsman argued that the law required publication of minutes within a week, the agency's manager said he believed that, because the minutes were not approved, they should not be published. Nonetheless, the council of governments agreed to change its practices. (0702187)
- A county assessor imposed a \$100-per-month fee to individual citizens to offset web hosting costs for an online database of properties. When the Ombudsman questioned the legal justification, the assessor eliminated the fee. (0701589)
- A county treasurer who had denied a man a copy of an affidavit that he needed to resolve a court matter reversed herself after the Ombudsman asked why the document was deemed confidential. (0702107)

- Although some candidates for the job of a small-town city clerk had not requested it, the town's mayor and city council went into closed session to make the hire without a vote and without stating a reason for the closure. They then failed to audiotape the closed meeting. Upon being questioned by the Ombudsman, the mayor acknowledged the city had not held a closed session in two years and agreed to educate herself on the law and undergo training. (0703096)
- After a clerk of a small city told a newspaper that the city council had asked candidates for a vacant council seat to request a closed session on the matter, the Ombudsman approached the clerk about the effect of the move. The clerk acknowledged that, by urging the candidates to sign a request for closed session, the city may have wrongfully given the impression that it required the closure. By law, city councils may only evaluate candidates in closed session if a candidate asks for it and it is demonstrated doing so would cause needless and irreparable harm. (0700037)
- Attendees at a meeting were unable to hear the voice of a council member who participated in a meeting via cell phone, and a tape recording of the meeting was of too poor a quality to understand. The Ombudsman suggested that the city purchase a new recorder and insure the public has access to the conversations of all participants. (0702348)
- A citizens' advisory committee appointed by the city council to recommend a new planning and zoning ordinance held its first meeting without providing public notice. After the Ombudsman inquired about the practice, notices have been consistently posted. (0702686)
- A city with a part-time clerk imposed a \$35 fee on future records requests after several citizens asked for a series of records. The Ombudsman intervened and persuaded the city to draw up a new policy that would allow the city charge only actual costs of providing a record. (0702865)
- A city council refused a citizen's request to release the identities or resumes of three finalists for police chief after a controversial decision to fire the previous chief. The Ombudsman requested the names of the finalists, noticed that one was an internal candidate, and informed the city that his resume could not be legally withheld. The city ultimately released that information to the citizen. (0700438)

Proposal for Dedicated Team Within the Office of the Citizens' Aide/Ombudsman

I currently utilize my entire staff to assist in performing our public records, open meetings and privacy (PROMP) responsibilities. One of the eleven assistant ombudsmen specializes in this topic and is responsible for coordination with other staff, research, and other projects on PROMP matters, in addition to carrying a general caseload. All assistant ombudsmen are responsible for reoccurring intake days during which they field complaints encompassing the wide range of the Ombudsman's jurisdiction and authority. PROMP cases may be received and worked by any one of the assistants, in consultation with the PROMP assistant and, as needed, legal and managerial participation.

We have been receiving an increasing number of PROMP contacts each year, some of these are informational requests, others are complaints in need of investigation. In addition, we work on "special projects" related to PROMP. These include education, training, and outreach to citizens and public officials, as well as legislative proposals. As highlighted elsewhere in this document, our casework involving PROMP issues has been wide ranging and productive.

Not every complaint is valid, nor does every valid complaint need to be prosecuted in order to be resolved. I have found that most of the complaints we substantiate do not require enforcement to correct a problem or change behavior. While some of the cases involve violations of law, others are actions that we determined to be unreasonable, unfair, or otherwise objectionable. In instances where I find a violation of law that warrants enforcement, I have the authority to refer such cases to the attorney general or a county attorney. I am currently considering several cases to refer to the Attorney General, as he requested. The cases I plan on referring are ones that involved reoccurring violations or public officials who did not respond to or accept my findings and recommendations. I believe my office could appropriately coordinate with the Attorney General in those circumstances needing prosecution.

I am familiar with the other styles of Public Access Counselors and FOI Commissions that have been created in the United States. I am also knowledgeable of the ways other countries have incorporated open records and open meetings responsibilities in their general jurisdiction or specialty ombudsman offices.

I believe the work my office is doing with PROMP matters can be further enhanced to better serve the state's citizenry. Following is my proposal for creating such a program. I have included a proposed budget to carry out a dedicated public records, open meetings, and privacy component within the Ombudsman's office.

Staff

Undertaking a full time PROMP assignment could be accomplished in the Ombudsman's office for about \$250,000. This means designating a full time legal counsel and a full time investigator (assistant ombudsman) dedicated to PROMP matters. Timely intake, investigation, research and publication of case summaries or issuance of public reports cannot be done by a single assistant ombudsman. Nor can the legal work be handled by the lone legal counsel who is responsible for advising all eleven investigators over the myriad of state and local issues and for enforcing and

defending the agency itself in any legal actions or challenges. I should be able to recruit a second, dedicated legal counsel for about \$82,000 including benefits. A specialty position in the Ombudsman's office is compensated at the Assistant 2 level, which means budgeting for that position also at approximately \$82,000 including benefits.

Next budget year I was planning to ask to fund the currently vacant Administrative Secretary position in my office. Our increasing caseload and other responsibilities compel me to consider re-filling that position, which was furloughed several years ago. Adding a dedicated PROMP section to the Ombudsman's office would make that hiring a necessity. Filling the support position would cost about \$56,000 including benefits.

Outreach and Training

I believe a dedicated PROMP component should be able to timely respond to 350 – 400 contacts per year by answering questions, providing written advisories, investigating complaints when necessary, achieving resolution, and conducting or participating in a targeted 24 trainings, and outreach activities annually. I estimate that the combined cost for trainings and outreach would be about \$8,100 per year. The team also would commit to providing semi-annual reports to the Legislature and Governor on the nature and disposition of PROMP complaints.

Another element of this function should be the development of a dedicated web page with FAQs, links and other useful information.

Mediation

When appropriate, I may want to use mediation as a tool to achieve resolution, or to deal with the aftermath of acrimonious conflict, such as we have seen in some communities after prolonged public records or open meetings disputes. I have been advised we could contract for 5-10 mediations, varying from simple to complex, for about \$5,000 per year.

Administrative Costs

Additional administrative costs would include two additional work spaces furniture (one time expenditure) and computers. We already have fax, copying equipment, and a computerized case management system.

If the General Assembly wishes, my staff and I are eager to undertake an enhanced and dedicated PROMP responsibility.

**Ombudsman's Office – Public Records, Open Meetings
and Privacy Function**

Personnel	
Assistant 2	81,275
Legal Counsel 1	81,275
Administrative Secretary	55,901
Equipment	9,000
Printing & Supplies	5,000
Travel	
Training	4,500
Outreach (2 x 12 mos)	3,600
Mediations	5,000
DAS Fees	1,050
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Total Estimated Cost	246,601